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NO. 88-365

Supreme Court, U.S.
FILED
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CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

APRIL RIVARD, et al.,	)	On Petition for a
	)	Writ of Certiorari
Petitioners	)	to the Supreme
	)	Court of Illinois
-vs-	)	
	)	
CHICAGO FIRE FIGHTERS	)	
UNION, LOCAL NO. 2,	)	
et al.,	)	
	)	
Respondents	)	

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

GILBERT FELDMAN, Esq.
CORNFIELD AND FELDMAN
343 South Dearborn Street
Thirteenth Floor
Chicago, Illinois 60604
(1-312) 922-2800

ATTORNEYS FOR RESPONDENT
CERTAIN

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NO. 88-365

IN THE
SUPREME COURT OF THE UNITED STATES

APRIL RIVARD, et al., Petitioners -vs- CHICAGO FIRE FIGHTERS UNION, LOCAL NO. 2, et al., Respondents	On Petition for a Writ of Certiorari to the Supreme Court of Illinois

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Certain Respondents the CHICAGO FIRE FIGHTERS UNION, LOCAL UNION NO. 2; FRANK MUSCARE, as President; WILLIAM REDDY, as First Vice President; and FRANK MURPHY, as Second Vice President; all of the CHICAGO FIRE FIGHTERS UNION, Defendants below, file this brief in opposition to the Petition for Writ of Certiorari.

PRELIMINARY STATEMENT

The Court should deny the petition because (1) the constitutional claims are facially frivolous, and (2) there is no claim of conflict to be resolved.

STATEMENT OF FACTS

Under Illinois common law, a voluntary unincorporated association could not sue or be sued in its own name. It could only sue or be sued by or against all of its members. Commencing in 1982, Petitioners brought separate suits in the Circuit Court of Cook County, Illinois, seeking money damages for injuries suffered as a result of fires that occurred during a 1980 strike by the Chicago Fire Fighters Union. Petitioners sued certain officers of the local union and both the local union and the international union,

voluntary unincorporated associations, in their own names.

The Illinois General Assembly, in 1955, adopted a law providing that a partnership could be sued in its own name and further providing that the partners were jointly and severally liable on a judgment against the partnership. Ill.Rev. Stat., Ch. 110, §2-411.

In Local 144, American Federation of Technical Engineers v. LaJeunesse, 63 Ill.2d 263, 347 N.E.2d 712 (1976), the Illinois Supreme Court refused to alter the common law with respect to labor unions, explicitly deferring to the legislature. From 1976 through 1983, the Illinois Supreme Court annually recommended legislative action to abrogate the common law as to unions, but the Illinois General Assembly did not respond. The Circuit Court dismissed

the suits because they had been brought in derogation of the common law.

The Illinois Appellate Court, in an opinion filed June 4, 1986, reversed on the ground that an intervening statute adopted by the Illinois General Assembly effective January 1, 1984, allowed voluntary unincorporated associations to sue and be sued in their own names and that the statute would be applied retroactively.

In an order entered June 10, 1986, (Appendix), the Circuit Court then dismissed the Complaints on the ground that there is no legal duty to provide adequate fire protection services, and, therefore, no cause of action. 1/

1/ This rule of law was later upheld by the Illinois Appellate in a similar case resulting from the 1980 fire fighter strike. Jackson v. Chicago Fire Fighters Union, 160 Ill.App.3d 975, 513 N.E. 2d 1002 (1987).)

The Illinois Supreme Court then reversed the Appellate Court decision, holding that the intervening statute was not retroactive and that the common law, therefore, applied to this case.

REASONS FOR DENYING THE PETITION

Petitioners' stated reasons for granting the writ can be characterized as esoteric legal theories lacking any clear nexus to the facts of this case. We particularize below in corresponding order to the points discussed in the Petition.

I. PETITIONERS HAVE NOT BEEN DENIED ACCESS TO THE COURTS.

Petitioners had access to the Illinois courts. They were entitled to sue any individual against whom they asserted a claim. They were also

entitled to reach the union treasury by a suit against all union members. They declined to bring either action. Instead, they brought an action against a legally non-existent entity, claiming that the State of Illinois was constitutionally obligated to create a fictional entity against whom they could bring suit.

Citing Boddie v. Connecticut, 401 U.S. 371 (1971), Petitioners equate state legislation and the common law, contending that the same standards govern state inaction as state action. No authority is cited for the proposition that states are required to repeal and/or replace the common law and we know of none.

Moreover, when government acts affirmatively to change the common law as to voluntary associations, legislative policy judgments necessarily are involved. For example, when the

Congress created a contract claim against unions by adopting Section 301 of the Labor-Management Relations Act, it exculpated union officers and members from individual liability. Atkinson v. Sinclair Refining Company, 370 U.S. 238 (1962). The Illinois General Assembly, however, when making partnerships suable, retained the rule of individual liability of partners. Ill.Rev.Stat., Ch. 110, Sec. 2-411. In the instant case, there was no guarantee that the General Assembly would not diminish or eliminate the cause of action against individuals if it made unions suable entities. For this additional reason there is no constitutional infirmity when a state fails to substitute a new scheme in replacement of the common law.

II. THE COMMON LAW RULE DOES NOT DENY PETITIONERS THEIR CIVIL RIGHTS.

A. Petitioners are not denied a jury trial.

The Seventh Amendment of the Constitution of the United States protects the right of civil jury trial as it existed under the common law. Article I, §13 of the Illinois Constitution does the same. Petitioners, however, contend that they are entitled to a jury trial on a claim which could not be brought under common law. No rationale is offered to support this facially erroneous and internally contradictory proposition.

Additionally, Petitioners argue that they are entitled to a jury trial with respect to a legally deficient Complaint. Their contention is that a case, in which a jury trial would otherwise be available, cannot be disposed of by a court on a question of law. Under

this reasoning, a judgment on the pleadings entered pursuant to Rule 12 of the Rules of Civil Procedure for the United States District Courts or summary judgment entered pursuant to Rule 56 thereof would be unconstitutional.

Petitioners were in fact entitled to a jury trial had they filed valid complaints or even properly amended their complaints once they were dismissed. However, they chose not to do so but rather to rest on their complaints.

Petitioners concede that they are requesting this Court to reconsider its previous decisions that the Seventh Amendment does not apply to the states. This is obviously not the case to embark upon consideration of such a grandiose issue.

B. Petitioners are not denied their right to petition the government.

This case has been heard and decided by the Illinois Supreme Court under Illinois law. Petitioners argue that the Illinois law is infirm. The contention by Petitioners that they were denied their right to petition the government, at most, is tantamount to the claim that Petitioners were denied access to the courts. Our response to that claim is equally applicable here.

III. REVIEW IS NOT WARRANTED BECAUSE THERE IS NO LEGAL CLAIM.

The Circuit Court of Cook County dismissed the Complaints on motion of the union officers on the ground that there is no duty to provide adequate fire protection services and, therefore, no tort or contract action lies for the failure to do so. That is the law of

Illinois. Jackson v. Chicago Firefighters Union, 160 Ill.App.3d 975, 513 N.E.2d 1002 (1987). It is also the law in the other states. See Jamur Products Corporation v. Quill, 273 N.Y.S.2d 348 (1966); Burns v. Local 100, Transport Workers Union, 464 N.Y.S.2d 712 (N.Y.Ct.App. 1983); Burke and Thomas v. IOMM&P, 600 P.2d 1282 (Wash. 1979); Fulenwider v. Firefighters Association Local Union 784, 649 S.W.2d 268 (Tenn. 1983); Lamphere Schools v. Lamphere Federation of Teachers, 400 Mich. 104, 252 N.W.2d 818 (1977); City of Fairmont v. Retail, Wholesale Union, AFL-CIO, 283 S.E.2d 589 (W.Va. 1981). Additionally, the federal courts have held that there is no constitutional right to adequate fire protection, Shortino v. Wheeler, 531 F.2d 938 (8th Cir. 1976); Ready v. Mullins, 456 F.Supp. 955 (W.D.

Va. 1978); or to adequate police protection, Reiff v. City of Philadelphia, 471 F.Supp. 1262 (E.D. Pa. 1979).

The fact that there is no cause of action under Illinois law is an additional reason why review is not warranted.

CONCLUSION

Certain Respondents respectfully request the Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

GILBERT FELDMAN
CORNFIELD AND FELDMAN,
Attorneys for Respondents Certain

APPENDIX

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

RIVARD et al
PLAINTIFFS

v.

CFFM LOCAL NO. 2 ET AL.
and DEFENDANTS
CARTER et al. —

VS

MUSCARE DEFENDANTS

NO. S 82L 4110
CONSOLIDATED
81L 7177

ORDER

THIS CAUSE COMING ON TO BE HEARD ON THE MOTION OF THE INDIVIDUAL DEFENDANTS FRANK MUSCARE, BILL ZIEDDI AND FRANK MURPHY TO RECONSIDER THIS COURT'S PREVIOUS ORDER ENTERED ON JUNE 6, 1983 AND THE COURT BEING FULLY ADVISED IN THE PREMISES AND FOR THE REASONS SET FORTH IN THE ATTACHED MEMORANDUM OF OPINION FILED ON JUNE 10, 1986,

IT IS HEREBY ORDERED THAT:

1. DEFENDANTS' MOTION TO RECONSIDER IS GRANTED;
2. THIS COURT'S PRIOR ORDER ENTERED ON JUNE 6 1983 IS VACATED; and
3. PLAINTIFFS' COMPLAINT ETC. DISMISSED.

ENTERED
CLERK OF THE CIRCUIT COURT
MORGAN M. FINLEY
JUN 10 1986
FILED
JUN 10 1986

Atty No.
Name J. DALE BERRY
Attorney for DEFENDANTS
Address CORNFIELD & FELDMAN
City 343 S. DEARBORN
Telephone CHICAGO
922 2800

..... 19.....
JUDGE THOMAS J. O'BRIEN
ENTER
DEPUTY CLERK

THOMAS J. O'BRIEN
Judge Judge's No.

MORGAN M. FINLEY, CLERK OF THE CIRCUIT COURT OF COOK COUNTY

FILED

JUN 5 1985

THOMAS J. O'BRIEN

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

April Rivard, et al.	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	No. 82 L 4100
	)	
Chicago Fire Fighters Union, Local No. 2, et al.	)	Consolidated for purpose of adjudicating Defendants' Motion to Dismiss with:
Defendants.	)	
	)	
and	)	
	)	
Bonnell Carter, et al.	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	No. 81 L 7177
	)	
Frank Muscare	)	
	)	
Defendants.	)	

MEMORANDUM OF OPINION

This Court granted defendants leave to file their motion to reconsider, allowed plaintiffs to file a written response, and took the matter under advisement on the briefs and without oral argument.

A similar case, Jackson v. Chicago Fire Fighters Union Local #2 et al, 84 L 6667, was dismissed by this Court after issuing a Memorandum Opinion on August 9, 1985. Although the reasons for the dismissal are set forth in the Opinion, generally speaking this Court felt obligated to dismiss Jackson on the basis of a later appellate court ruling in

Galuszynski v. City of Chicago, 131 Ill.App.3d 505 (1st Dist. 1985) which found that no duty existed between a public employee (policeman) and a member of the general public in the absence of a special relationship. Judicial consistency requires the same result here unless the argument of plaintiffs dictate otherwise.

The suggestion that this Court is bound by the doctrine of "Law of the Case" is rejected since a trial judge is not bound by the prior order of another judge and he may review an order if in his judgment it was erroneous. Furthermore he has the duty so to do if a change of facts or circumstances make the prior order unjust. Scardina v. Colletti, 63 Ill.App.2d 481 (1st Dist. 1965). A court is not bound by the prior orders of another judge and it has the power to correct erroneous orders after careful consideration. Towns v. Yellow Cab Co., 73 Ill.2d 113 (1978). Certainly the same rationale applies to reconsideration of a judge's own orders.

As stated in the Jackson opinion, this Court believes the threshold issue is one of duty. A thorough review of plaintiffs' arguments does not convince the Court that it should not vacate its prior ruling and enter an order for dismissal consistent with Jackson v. Chicago Fire Fighters and Galuszynski. The Court believes its analysis in Jackson is the correct application of Illinois law as to the duty of a public employee who withholds services. This conclusion, like it or not, logically follows from the rationale stated

in both Galuszynski and Marshall v. Ellison, 132 Ill.App.3d 505 (1st Dist. 1985)

In response to plaintiffs invitation to follow California cases interpreting its tort immunity act, this Court responds by acknowledging its obligation to follow Illinois law where it exists, rather than speculating as to whether Illinois would adopt the rationale of California Courts as to the meaning of similar statutes. As this Court alluded to in its Jackson opinion, plaintiffs do not competently allege acts of active interference with fire fighting conduct. (See, footnote #1 Jackson opinion.) Simply put, the withholding of services under the circumstances alleged in plaintiffs' complaints creates no special relationship upon which a duty can be found under Galuszynski.

Plaintiffs' argument that they had a reasonable expectation of reliance on fire protection services is an argument that equally could have been made in Galuszynski. Certainly the telephone communication to police requesting help and receiving a late response or no response at all is no different than the acts alleged in the instant case. The intentional withholding of services, while morally reprehensible, does not create any special relationship or duty. As the appellate court instructs, "It is well settled that the duty of the police is to preserve the well being of the community at large, and that such duty is generally not owed to specific individuals." Galuszynski v. City of Chicago, 131 Ill.App.3d at 506. Although the plaintiffs in Galuszyn-

ski invited the appellate court to follow the rationale of a New York case, De Long v. County of Erie 89 App.Div.2d 376, 455 N.Y.S. 2d 887 (1982), wherein it was held the municipality assumed a duty, our appellate court rejected the New York court's analysis, observing it "was not written with an eye toward the Illinois Governmental Immunity Act or the Illinois decisional law regarding the 'special duty' exception to the immunity afforded therein." Galuszynski v. City of Chicago, 131 Ill.App.3d at 509 (emphasis added).

Plaintiff's suggestion that this Court's interpretation of the Tort Immunity Act would lead to bizarre results is not a fair reading of the Jackson opinion. Comparing the acts of a firefighter who at the scene of a fire commits arson or theft with the acts of a firefighter who illegally withholds his services is not an even-handed comparison. Although a firefighter may owe only a duty to the general public in fighting a fire obviously he owes a duty to the identifiable owners of private property not to intentionally damage it or convert it to his own use. Such is not the case alleged in plaintiffs' complaints where the harm done is to a member of the general public under circumstances where no special duty exists.

For the above reasons as well as those stated in the Jackson opinion the court grants defendants' motion to reconsider, vacates it prior order of June 6, 1983, and grants defendants' Motion to dismiss the Complaints.

Defendants shall draft an order consistent with this Memorandum of Opinion.

ENTERED
ENTERED OF THE CIRCUIT COURT
MORGAN M. FINLEY
JUN 5 1996
THOMAS J. O'BRIEN

Date:

Judge Thomas J. O'Brien